

LASTING POWERS OF ATTORNEY EXPLAINED

WHAT IS A LASTING POWER OF ATTORNEY, OR LPA?

An LPA is a written document, introduced by the Lasting Powers of Attorney and Capacity Act 2018, which allows you to appoint someone to make decisions on your behalf if or when you are no longer able to make them for yourself.

By setting up an LPA, trusted individuals, known as donees, are granted the legal authority to look after your affairs. The donee can be a family member or loved one, who will be given the legal right and obligation to act in your best interests under the LPA. It is called 'lasting', because the power given in the LPA continues even once you lose mental capacity.

“None of us like to think of a time when we or our loved ones may no longer be able to manage our own affairs, but it is comforting to know that there are procedures in place to enable someone trusted to do it for us”.

Capacity is the mental ability to make decisions about a particular matter, at a particular time.

People may lack capacity to make a decision for many reasons. It may be because of, for example, a stroke, mental illness, dementia, brain damage, physical or medical conditions that cause confusion or loss of consciousness, delirium, concussion following a head injury, or the symptoms of alcohol or drug use.

The key is to make LPA arrangements early on. It is easy to think that this does not need to be thought about yet, or for many years to come, but no one knows what the future holds. Crucially, an LPA can only be set up by a person with capacity. If capacity is lost suddenly and unexpectedly, it is too late to put an LPA in place.

WHO CAN SET UP AN LPA?

Anyone over the age of 18 can make an LPA. A person making an LPA is called a donor. It is important that the LPA is made whilst you are still capable of making decisions about who to appoint and what powers are to be granted to your donee or donees.

A donee should be a person you trust to make decisions on your behalf, in accordance with the restrictions you may choose to set out in your LPA. You may appoint one or more donees to act on your behalf under an LPA.

DOES EVERYONE NEED AN LPA?

If you become unable to make decisions about your own affairs, someone else is going to need to do this for you. Many people do not realise that in such circumstances, there is no automatic legal authority for a family member to manage your affairs for you.

An LPA is a written record, to ensure your wishes are clearly set out and recorded in advance. It appoints a certain person to make decisions for you, in the event that you cannot make them yourself. It also offers your appointed donee guidance on how you want decisions to be made, as well as setting restrictions on what the donee can and cannot do on your behalf.

There are two types of LPA:

1. **Property and Financial LPA**; and
2. **Health and Welfare LPA**.

The LPA is not valid until registered in the LPA Register at the Supreme Court of Gibraltar.

1. PROPERTY AND FINANCIAL LPA



This type of LPA will give your chosen donee the power to make decisions about any or all of your property and financial affairs. The donee must act in your best interests. Once registered, it can be used both whilst you have capacity (should the LPA state that it should, and once you no longer have capacity).

The LPA can give the donee named in the LPA authority to do any of the following:

- manage bank accounts (including paying any bills that need paying for your care);
- buy property;
- sell property/ your home;
- collect pension payments on your behalf.

HOW A DONEE SHOULD MANAGE YOUR FINANCES

The donee has a duty to handle your finances in your best interests and be able to show that this is the case. It is a serious role. The donee of an LPA has a binding duty to have regard to the Code of Practice issued under the Lasting Powers of Attorney and Capacity Act 2018. A donee can face up to ten years in prison should they wilfully neglect or abuse their position.

- The donee must keep your finances completely separate from their own, unless you have a joint bank account or own a home together, (for example, if your partner is your donee).
- A donee is entitled to buy or sell property on your behalf if it is in your best interests. For example, it may be that a sale is required to free up money to pay for your care.
- The donee must keep accounts of your assets, income, spending and outgoings. The Court of Protection can ask to check these if there is any suspicion of abuse.

The donee is entitled to buy gifts or give gifts of money on your behalf, including making donations to charities, but only to people to whom you would normally send gifts and only on suitable occasions such as birthdays and weddings, or to charities to which you normally make donations. The gifts must also be reasonable, taking account of your assets.

2. HEALTH AND WELFARE LPA



This allows you to choose someone to make decisions about your health and personal welfare. You can decide to give a donee the power to make decisions about any or all of your health and welfare matters.

An appointed donee can only make decisions on your behalf once the LPA is registered in the LPA Register at the Supreme Court of Gibraltar and, (importantly), only once you can no longer make those decisions yourself- i.e., once you have lost capacity.

WISHES FOR HEALTH AND CARE

A Health and Welfare LPA gives you the opportunity to ensure you will be cared for in the way that you wish, even if you are not able to state your preferences at the time.

By having a Health and Welfare LPA in place you will ensure that the donee of your LPA will be able to make potentially difficult decisions about your lifestyle and care if, for some reason, you are no longer able to.

A Health and Welfare LPA enables your donee to make decisions on your behalf about:

- your daily routine: activities such as washing, (whether you prefer baths or showers), dressing, (what you prefer to wear), and eating, (likes and dislikes);
- your healthcare: the kind of treatments you are happy to receive; and
- your living arrangements: whether you will live in your own home or move into a care home.

A Health and Welfare LPA is different to a Property and Financial LPA. Each type of LPA is different and needs to be completed and registered separately.

Someone called a 'certificate provider', who has known you for at least two years before making the LPA, or a suitably qualified person such as a doctor, lawyer or independent capacity advocate, will need to confirm that you fully understand the LPA before you sign it.

OTHER WAYS TO PLAN YOUR FUTURE HEALTH AND WELFARE

There are ways by which you can state your preferences to your loved ones, in order to help them make health and welfare decisions on your behalf in future, such as:

- you can write a statement of your preferences and wishes – this is not legally binding, but would ensure that your views are taken into account as part of any best interests decision-making by your relatives or loved ones;
- if you receive health or social care services, you can create a care plan – a written document stating the types and frequency of those services;
- you can make an Advance Decision to refuse treatment – this is a legally binding document that allows you to specify particular kinds of treatment that you do not want, (in case you lack capacity to make this decision for yourself in future).

ADVANCE DECISIONS

This type of decision is also sometimes called a 'living will', as it lets you dictate the terms of your treatment should you become physically unable to communicate them. Within this document, you can be specific about the treatment you do not want to receive. You can also refuse treatment that may keep you alive, such as life support, if this is your wish.

As with an LPA, the advance decision to refuse specified medical treatment in future must be made whilst you still have capacity. Provided the provisions contained in the advance decision apply to the particular circumstances encountered by the persons supplying treatment, it will be as if you had capacity to refuse the treatment at the relevant time, and medical staff will not be liable for complying with your advance decision to refuse treatment. The advance decision can be changed or revoked at any time when you still have capacity to do so.

It may be that your LPA refers to an advance decision. The advance decision and LPA should never contradict one another in any way. If they do, an application may need to be made to the Court of Protection for guidance on how to make decisions and about whether or not a particular treatment should be given.

HOW TO PUT AN LPA IN PLACE

There are various templates, found on HM's Government of Gibraltar website, which you can use to put in place an LPA. Alternatively, you can instruct a lawyer who is familiar with the Lasting Powers of Attorney and Capacity Act 2018, to assist with the drafting and registration of your LPA.

In order to be valid, an LPA must be signed by the donor in the presence of two witnesses. The LPA, once signed, must be registered. The LPA is only effective and can only be used once it has been registered. If there are any errors from the prescribed format, the LPA Registrar will contact you and ask for these to be amended.

HOW TO REGISTER AN LPA

The LPA must be sent to the LPA Registrar to be registered in the LPA Register at the Supreme Court of Gibraltar. The registry will charge you a registration fee of £100 in order to register the LPA.

Remember, there are two types of LPA. If you want both a Property and Financial LPA and a Health and Welfare LPA you will need to set up and register them individually even if you are using the same donee or donees for both.

If there are no mistakes in the LPA submitted for registration, the Registry will return the LPA with a certificate. You can then use this paperwork to prove you have a valid LPA and the donee has the authority to act on your behalf.

MANAGING WITH NO LPA

If you lose your mental capacity with no LPA in place, family or friends need to apply to become a 'deputy' in order to make decisions on your behalf. This application is made to the Court of Protection and as with LPAs there are two types of deputy:

- a deputy for property and financial affairs, taking charge, for example, of paying bills; and
- a deputy for personal welfare, making decisions about medical treatment and how someone is looked after.

Applying for deputy status can be a long and costly process, which can be avoided by advance planning and putting an LPA in place before capacity is lost.

IMPORTANT POINTS TO REMEMBER

- an LPA must be made whilst you are still capable of making decisions;
- you may, at any time when you have capacity, change or revoke the LPA; and
- as a safeguard, a Health and Welfare LPA can only be used when you no longer have the capacity to make decisions.

HAVE YOU WRITTEN A WILL?

- It is a good idea to have a valid will in place, setting out how you want your possessions to be distributed following your death, as well as covering issues such as the care of dependants. A will is separate to an LPA and serves a different purpose.
- The LPA covers the time whilst you are alive, but without adequate mental capacity. A will covers the distribution of assets once you pass away.
- A donee cannot prepare a will on your behalf under an LPA, so it is a good idea not to leave it too late.

GLOSSARY

Advance decision

Information filed with a person's medical records informing healthcare professionals of the kind of treatment they do not want should they become ill.

Best interests

Anything done for people without capacity must be in their best interests, (there is no legal definition of best interests but the criteria to be used is set out in the Mental Health Act 2016). Best interests means thinking about what is best for the person, not about what anyone else wants.

Capacity

The mental ability to make decisions about a particular matter at a particular time. The legal definition of capacity can be found in the Mental Health Act 2016.

Certificate provider

The person the donor chooses to complete a certificate in the LPA. The certificate provider must confirm that the donor understands the LPA and is not under any pressure to make the LPA. Section 10(2) and (3) of the Lasting Powers of Attorney and Capacity Act 2018 set out who can and cannot be a certificate provider of an LPA.

Code of Practice

Guidance issued under the Lasting Powers of Attorney and Capacity Act 2018.

Court of Protection

The Court that makes decisions and rulings in relation to those who lack capacity.

Deputy

A person appointed by the Court of Protection to make decisions for someone who has lost capacity and for whom no LPA is in place.

Donee

Someone who has the legal right to make choices and decisions on behalf of the donor, within the scope of the authority granted by the LPA. The donor chooses who their donee will be. Donees are also sometimes called attorneys.

Donor

The person making an LPA, who appoints a donee to make decisions on his/her behalf.

Independent capacity advocate

Individuals who help those who lack capacity to make decisions about their health and social care, when the person without capacity has no family members or others to assist them. Their role is to be independent from the patient and to ensure that the person's wishes are respected and followed.

Lasting Power of Attorney

A legal document which appoints a donee in the event that you lose the capacity to make your own decisions. There are two types: Health and Welfare LPAs and Property and Financial LPAs.

Lasting Powers of Attorney and Capacity Act 2018

An Act of Parliament about how to support and protect people who cannot make their own decisions. The Act makes it clear who can take decisions, in which situations, and how they should go about this. It lets people plan ahead for a time when they may lack capacity to make their own decisions about some things.

Mental Health Act 2016

An Act of Parliament to provide for the care and treatment of mentally disordered persons.

Property

The things you own (e.g., a house, car, bank accounts).

Witness

Someone who signs an LPA to confirm they have witnessed the donor signing and dating the LPA.